

FILED BY CLERK

JUN 29 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0150-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
STEWART BRADLEY GREEN,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2009108417001SE

Honorable Teresa A. Sanders, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Adam Susser

Phoenix
Attorneys for Respondent

Stewart Bradley Green

Florence
In Propria Persona

H O W A R D, Chief Judge.

¶1 Pursuant to a plea agreement, petitioner Stewart Green was convicted in 2009 of one count of sexual assault and two counts of attempted sexual assault. The trial court sentenced Green to a presumptive, seven-year prison term on the first count, and

suspended the imposition of sentence on the other two counts, placing him on concurrent terms of lifetime probation to begin upon his release from prison. In May 2010, nine months after he was sentenced, Green asked the court for permission to file a late petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.4(a) (Rule 32 notice must be filed within ninety days after judgment and sentence or within thirty days after appellate court issues mandate).¹

¶2 Appointed counsel subsequently filed a notice of completion of post-conviction review, noting he was unable to find any claims to raise in a petition for post-conviction relief and asking that Green be permitted to file a pro se petition. *See Montgomery v. Sheldon*, 181 Ariz. 256, 260, 889 P.2d 614, 618 (1995). Green then filed a pro se petition for post-conviction relief pursuant to Rule 32. The trial court denied the petition, finding Green “failed to raise a colorable claim for relief.” Green now challenges the court’s denial of that petition. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse of discretion here.

¶3 Green’s petition for review includes the following confusing request for relief: “Do to false and misleading statements by the prosecutor the courts failure to address the issues in question the petitioner pray this court to review the record and uphold the ruleings of the court. Grant the change of plea to not guilty (actual innocence)” Notably, although many of Green’s arguments contain extensive citation to legal

¹Although the court did not expressly grant Green’s request, it is clear from the record the court treated the petition he ultimately filed as timely.

authority, large portions of them contain no cogent legal argument as to the relation of that authority to Green's case. In summary, Green seems to argue: counsel was ineffective; the state engaged in prosecutorial misconduct by "maliciously tendering false information"; his rights during the grand jury proceeding were violated; the charges in the indictment were duplicitous and/or multiplicitous; and, he was denied the right to a "fair trial." With the exception of the claim of ineffective assistance of counsel, and to the extent we understand the asserted claims, Green either waived them by his plea of guilty or he failed to raise claims cognizable under Rule 32.

¶4 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below prevailing professional norms and that the outcome of the case would have been different but for the deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). "To avoid summary dismissal and achieve an evidentiary hearing on a post-conviction claim of ineffective assistance of counsel," a petitioner must present a colorable claim on both parts of the *Strickland* test. *State v. Fillmore*, 187 Ariz. 174, 180, 927 P.2d 1303, 1309 (App. 1996); *see also* Ariz. R. Crim. P. 32.6(c) (summary dismissal appropriate unless material issue of fact or law exists), 32.8(a) (defendant entitled to hearing if material issue remains). A colorable claim is "one that, if the allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). Based on the record before us, and for the reasons set forth below, the trial court did not abuse its discretion by denying Green's claim of ineffective assistance of counsel.

¶5 In his petition for review, Green essentially restates the arguments he made in his petition for post-conviction relief, without explaining how the trial court abused its discretion. And, like his petition below, his petition for review is devoid of citations to the record. *See* Ariz. R. Crim. P. 32.9(c)(1) (petition for review must comply with rule governing form of appellate briefs and contain “reasons why the petition should be granted” and either appendix or “specific references to the record”). Additionally, the handwritten affidavit attached to Green’s petition for post-conviction relief is dated March 24, 2011, while the petition appears to have been notarized on March 21, 2011. And, the same March 21, 2011 verification precedes the undated, handwritten affidavit attached to the petition for review, which is written in different handwriting than the first affidavit. *See* Ariz. R. Crim. P. 32.5 (“Facts within the defendant’s personal knowledge shall be noted separately from other allegations of fact and shall be under oath.”). In summary, Green’s failure to comply with Rule 32.9(c)(1), additionally justifies our refusal to grant relief.² Finally, to the extent Green requests we grant an oral argument, we deny that request. *See* Ariz. R. Crim. P. 31.14(a).

¶6 Because Green has not addressed, much less established, how the trial court abused its discretion by denying post-conviction relief, we find no abuse of discretion in

²We note that, although the state asserts Green’s claims are precluded as untimely and successive, we do not deny relief for this reason. As previously noted, because the court permitted Green to proceed despite his otherwise untimely petition, we infer it deemed the petition timely. Additionally, the record does not support the state’s assertion that this is a successive pleading. Because Green was represented by counsel when he filed his first pro se petition for post-conviction relief, the trial court did not consider that pleading.

the court's denial of his petition. Although we grant the petition for review, we deny relief.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge